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No._____

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IN THE

Supreme Court of the United States

October Term, 1982

HUDSON FARMS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
EIGHTH CIRCUIT**

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QUESTION PRESENTED

Whether live-haul truck drivers and yard personnel are exempt from coverage as agricultural laborers within the meaning of Section 2(3) of the National Labor Relations Act.

PARTIES TO THE PROCEEDING

The following listed persons or entities are either parties to or have a pecuniary interest in this proceeding:

Hudson Farms, Inc.
Hudson Foods, Inc. (Parent Corporation)
National Labor Relations Board
General Drivers And Helpers Local No. 823, Affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Hudson Farms, Inc., prays that a Writ of Certiorari issue to review the Decision and Order of the United States Court of Appeals for the Eighth Circuit enforcing an Order of the National Labor Relations Board (hereinafter the "Board").

OPINIONS BELOW

The Opinion issued by the Court of Appeals on July 1, 1982 is reported at —F.2d—, 110 LRRM 2969 (8th

Cir., 1982), and is reproduced in Appendix A of this Petition. The Decision and Order of the National Labor Relations Board, 258 NLRB NO. 49, rendered on September 30, 1981, is unofficially reported at 108 LRRM 1239 and is reproduced in Appendix B.

JURISDICTION

The Order of the United States Court of Appeals for the Eighth Circuit enforcing the Board's Order was entered on July 1, 1982. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act (hereinafter "NLRA"), 29 U.S.C. §152(3) and The Fair Labor Standards Act (hereinafter "FLSA"), 29 U.S.C. §203(f) are set forth in Appendix C.

STATEMENT OF THE CASE

Hudson Farms, Inc., (hereinafter "Hudson Farms"), a vertically integrated poultry producer is a wholly owned subsidiary of Hudson Foods, Inc., and is engaged in the raising of broilers (Tr. 16, 45).[1] In this regard Hudson Farms must perform a number of tasks, each involved in the broiler life cycle.

Hudson Farms purchases one-day-old breeding stock from outside suppliers (Tr. 46-47) who deliver the breeding stock (pullets) to independent pullet growers who are under contract with Hudson Farms to feed the pullets for approximately 20 weeks until they reach

[1] "Tr." refers to the original reported transcript before the Board.

egg producing age (Tr. 16, 17, 19). Hudson Farms provides the pullet growers with feed, medication and service personnel (Tr. 17). Once the pullets reach egg producing age they are transferred to breeding and laying facilities where they produce hatching eggs (Tr. 17, 19).

The eggs produced by the breeding flock are transported on Hudson Farms' trucks to egg hatcheries also owned by Hudson Farms (Tr. 18). The eggs hatch after approximately three weeks, and the baby chicks are then debeaked and vaccinated at the hatchery (Tr. 18, 19). The chicks are then transported by Hudson Farms hatchery employees to independent contract growers where the birds are grown for approximately seven and one-half weeks (Tr. 20).

These independent contract growers are under contract with Hudson Farms to provide land, buildings, utilities and labor in order for Hudson Farms' chickens, or broilers, to grow to market weight (Tr. 30). In exchange, Hudson Farms agrees to pay the grower a set rate per pound of broiler growth produced (Tr. 25-27, 42). Hudson Farms specifies and supplies to the grower the type medication and feed it desires its broilers to be fed. Hudson Farms also provides certain standards which the growers must maintain. For example, Hudson Farms specifies the type of equipment the grower must provide, the temperature to be maintained in the buildings and the type and amount of ventilation (Tr. 30). Hudson Farms' broiler supervisors visit the growers at least once a week to be sure that the growers properly perform their jobs, and to handle any problems the growers might have (Tr. 30, 31, 51).

During the broilers' stay at the grower's farm, own-

ership of the broilers remains with Hudson Farms (Tr. 25). The market risk inherent in the broiler industry is borne exclusively by Hudson Farms, not the independent contract growers. For example, the price which Hudson Farms obtains for its broilers can fluctuate five to seven cents per pound in a week (Tr. 33, 35). While the price Hudson Farms receives for the broilers may be fluctuating, its cost of producing those broilers may also change. The major expense of Hudson Farms in producing a broiler is the cost of feed. The major ingredient, corn, has doubled in price in the past two years (Tr. 35). Thus, while the grower's income remains relatively stable, any market risk in producing the broilers remains with Hudson Farms.

When the broilers have grown to market weight (approximately four pounds), Hudson Farms' employees, known as chicken catchers, go to the growers' farms, catch and coop the broilers, and load the cooped birds on live-haul trucks belonging to Hudson Farms and driven by Hudson Farms' live-haul drivers, the workers involved in this case (Tr. 22). The broilers are then delivered to the Hudson Farms live-haul truck lot, a receiving area which is located in Noel, Missouri adjacent to a poultry processing plant operated by Hudson Foods, Inc. (Tr. 22). Hudson Farms pays Hudson Foods, Inc. a fee for processing its broilers, and Hudson Farms then sells the processed broilers (Tr. 27).

In December, 1980, General Drivers & Helpers, Local 823, affiliated with the International Brotherhood of Teamsters (hereinafter the "Union"), petitioned for a Board supervised election among a unit of Hudson Farms' live-haul drivers and yard employees operating out of Noel, Missouri. The live-haul drivers in issue

transport the cooped Hudson Farms' live broilers from the growers' farms to the Hudson Farms' receiving facility. The yard employees shuttle the trucks loaded with the cooped birds from the receiving facility to the Hudson Foods, Inc. processing plant, as needed.

A representation hearing was held on the Union's petition for an election. At the hearing Hudson Farms contended that the petition should be dismissed since the live-haul drivers and yard personnel were agricultural laborers within the meaning of Section 2(3) of the NLRA as defined by Section 3(f) of the FLSA, 29 U.S.C. §203(f). The live-haul drivers and yard personnel, if agricultural laborers, would not be "employees" within the meaning of Section 2(3) of the NLRA.

The Board's Regional Director found that the live-haul drivers and yard personnel were employees under Section 2(3) of the NLRA and not agricultural laborers (App. B at 17a). As employees, the Regional Director ruled that they would constitute an appropriate bargaining unit and directed a Board election in that unit (App. B at 20a).

Hudson Farms timely requested review of the Regional Director's decision and the Board affirmed the Regional Director's decision and direction of an election. The Union won the election and was certified by the Board. Hudson Farms then refused to bargain with the Union, contesting the validity of the certification. The Board, upon charges filed by the Union, reasserted its findings that Hudson Farms' live-haul drivers and yard personnel were employees constituting an appropriate unit for the purposes of collective bargaining and found that Hudson Farms had violated Section 8(a)(5) and (1) of the NLRA by not bargain-

ing with the Union (App. B at 12a) and issued a bargaining order (App. B at 14a).

The Court of Appeals for the Eighth Circuit, acting upon the petition of the Board pursuant to Section 10(e) of the NLRA, granted enforcement of the Board's bargaining order (App. A at 4a).

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW AND TO END THE CONFLICT BETWEEN THE FIFTH AND EIGHTH CIRCUITS AS TO THE EXEMPT STATUS OF LIVE-HAUL DRIVERS AND YARD PERSONNEL UNDER THE FAIR LABOR STANDARDS ACT AND THE NATIONAL LABOR RELATIONS ACT RESPECTIVELY.

The poultry industry in general and vertically integrated poultry producers in particular affected by this case are of vital importance to the national economy. The vertically integrated company has developed into the only significant producer of poultry. More than ninety-five percent of the broilers produced are attributable to vertically integrated companies.[2] The importance of issues affecting this industry has been further highlighted in that this Court has granted certiorari to consider other issues arising out of the poultry industry on two recent occasions.[3] For this reason the present conflict concerning the scope of agricultural exemption existing between the Eighth and Fifth Circuits and, in a greater sense, between the NLRA and the FLSA, must be resolved by this Court.

This case, on petition for Writ of Certiorari from a decision of the Eighth Circuit Court of Appeals, has

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[2] **The Broiler Industry: An Economical Study of Structure, Practices and Problems,** U.S. Department of Agriculture (1971).

[3] **National Broiler Marketing Association v. U.S.,** 436 U.S. 816 (1978); **Bayside Enterprises, Inc. v. NLRB,** 429 U.S. 298 (1977).

created a significant conflict among two circuits as to the scope of the agricultural exemption under the FLSA and the NLRA.[4] As this Court has perceived from earlier segments of this petition, the Eighth Circuit has approved the Board's rigid decision that once an integrated poultry producer such as Hudson Farms has given up temporary custody of its product, broilers, its live-haul drivers and yardmen cannot be considered exempt agricultural employees under Sec. 2(3) of the NLRA.

The foregoing decision of the Eighth Circuit is in direct conflict with a decision by the Fifth Circuit Court of Appeals in an almost identical factual context[5] construing the agricultural exemption under the FLSA in the case of *Coleman v. Sanderson Farms*, 629 F.2d 1077 (5th Cir., 1980). While it is immediately apparent that these conflicting decisions arise under different Acts, the conflict created is highly undesirable and requires prompt resolution in this Court.

Since 1946 the Congress has attached riders to the National Labor Relations Board's Appropriation Acts providing that the term "agricultural laborer" under Section 2(3) of the NLRA shall be defined in accordance with Section 3(f) of the FLSA.[6] As alluded to

[4] 29 U.S.C. §203 and 29 U.S.C. §152.

[5] The Fifth Circuit ruled that live-haul drivers, the same group of employees involved in the instant case, were exempt as agricultural employees under the Fair Labor Standards Act, 29 U.S.C. §203. Live-haul drivers transport live poultry from employers' farms. In both cases the live-haul drivers transported the poultry to what are referred to in the poultry industry as cooling sheds, a place to temporarily hold live poultry. Additionally, in **Sanderson Farms, infra.**, the live-haul drivers also transported the poultry directly to a processing facility.

[6] 60 Stat. 698; 87 Stat. 763; 92 Stat. 1587; 94 Stat. 3166.

earlier, the Board's Order in this case as enforced by the Eighth Circuit creates a situation where employees performing practically identical tasks are treated differently under the same statutory language.

The Congress, in adopting the agricultural exemption from the FLSA, obviously intended the scope of the exemption under the two Acts to be identical. Otherwise, Congress would have drafted totally new language or adopted the language from some other statute. The Board, itself, has recognized the desirability of maintaining uniformity of interpretation between the two Acts. *OLAA Sugar Co., Ltd.*, 118 NLRB 1442 (1957). The Board summarized in *OLAA* the considerations why it is important for this Court to resolve the existing conflict. The considerations of comity among agencies, uniformity in statutory construction and maintenance of a consistent labor policy were touched on by the Board. In *OLAA*, the Board deferred to the position established under the FLSA for the considerations referred to above. In addition, the Board acknowledged that an interpretation under the FLSA should be afforded respect, noting that Congress had singled out the FLSA to be a guide to interpretation of the agricultural exemption under the NLRA.

The Board, it would appear, is now content to no longer attune its decisions to the teachings of cases arising under the FLSA. Indeed, in the case at bar, the Board, supported by the Eighth Circuit, has seen fit to abandon the approach exposed by *OLAA* in favor of a policy of confrontation whenever its reasoning is challenged. Notwithstanding this, the considerations underlying *OLAA* are no less important or forceful today, and require resolution of the conflict by this Court.

II. THE DECISION BELOW IS AN ERRONEOUS APPLICATION OF THIS COURT'S DECISION IN *BAYSIDE*.

In determining whether an individual is an agricultural laborer and, therefore, exempt from coverage under the NLRA, Congress has designated the definition of agriculture to be the same as that promulgated in the FLSA. The Board, however, through some misconception of its own administrative expertise and the deference to be afforded its decisions, has created its own definition of agriculture, spawning different treatment among the two Acts for employees performing the same duties under identical statutory language. In support of this position the Board has erroneously cited this Court's decision in *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 398 (1977).

In this case, the Board, supported by the Eighth Circuit in its decision, has once again restated its adherence to the proposition that a vertically integrated poultry producer irrevocably loses farmer status after it places broilers with an independent contract grower, irrespective of the nature of the integrated producer's operation following such placement.[7] The Board, in support of this position, merely recites this Court's decision in *Bayside*.[8] This artificial cut-off point can-

[7] The Board has asserted this position through a series of cases:
Strain Poultry Farms, Inc., 160 NLRB 236 (1966);
Victor Ryckebosch, Inc., 189 NLRB 40 (1971);
IMCO Poultry, 202 NLRB 259 (1973);
Bayside Enterprises, Inc., 216 NLRB 502 (1975);
Valmac Industries, 237 NLRB 992 (1978).

[8] This Court, in footnote 9 in **Bayside Enterprises v. NLRB, supra**, at 302 noted the Board's position on the farmer status of an integrated poultry producer quoting from the Board's decision in **IMCO Poultry, supra.**

not be supported by a careful reading of the *Bayside* decision.

In *Bayside*, this Court was presented with a fact situation different in one material detail from this case — a detail which cannot be overlooked. The truck drivers in *Bayside* transported feed, an inanimate object, which was the product of a feed mill, a non-farm related enterprise. The drivers in the instant case were transporting raising if you will, a specifically covered agricultural commodity, broilers. On the surface, this appears to be a somewhat fine distinction. However, after scrutinizing the Board's position in *Bayside*, this distinction is appropriate.

The appellants in *Bayside* argued that most all operations of a vertically integrated poultry producer should be considered exempt. The argument was premised on the economic realities involved in broiler production. A vertically integrated poultry producer is one hundred percent at risk throughout the entire life cycle of the poultry, since the Company never relinquishes ownership of the birds. A typical vertically integrated producer has total control over all decisions regarding the care, medication, feeding and husbandry of the broilers. For these reasons, which are equally present in the instant case, the appellant in *Bayside* vigorously argued it should be afforded farmer status throughout the production cycle. Thus, all its workers would be considered exempt for the purposes of the NLRA. The Board successfully argued for, and this Court adopted in *Bayside*, an approach by which each activity of the employer is examined separately to determine whether the employer is engaged in farming in either its primary or secondary sense. *Farmer's Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755

(1949).[9] This Court, acknowledging the deference it extends to Board factual findings, found the activities of *feed* truck drivers to be incidental to Bayside's feed-mill operation rather than incidental to the care of the broilers in the possession of the independent growers. In rejecting an across-the-board approach advocated by the employer in *Bayside*, this Court adopted the Board's position that each case stands on its own as it relates to a determination of whether the activity in which the employer engages is susceptible to the agricultural exemption.[10] One would surmise that the Board, having won its battle in *Bayside*, would adhere to its tenants and analyze each activity performed by an employer separately. This, however, has not been the case.

The Board has ignored the clear teaching of *Bay-*

[9] In **Farmer's Reservoir & Irrigation Co. v. McComb**, this Court recognized that the definition of agriculture under Sec. 3(f) of the Fair Labor Standards Act has two branches:

"First, there is the primary meaning. Agriculture includes farming in all its branches . . . cultivation and tillage of the soil, dairying, etc., are listed as being included in this primary meaning. Second there is the broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." **Id.** at 762-763.

[10] In **Bayside, supra.**, this Court even hinted that some operations of an independent grower, in the Court's language a contract farm, might be considered as susceptible for the exemption:

"Even if we should regard a **contract farm** as a hybrid operation where some of the agricultural activity is performed by **Bayside** and some by the owner of the farm. . . ." **Id.** at 303, [Emphasis Added].

side, and now argues that this Court has unconditionally approved the Board's conclusion that, in all cases, once a vertically integrated poultry producer gives up temporary possession of the broilers to the independent growers, it loses forever farmer status as to those broilers. This conclusion by the Board, approved by the Eighth Circuit's decision in this case, cannot be supported. If *Bayside* stands for anything, it stands for the proposition that the factual background surrounding the operation of an employer is ultimately determinative of whether the agricultural exemption is available. In *Bayside,* this Court went to considerable lengths to comment upon the respect it extends to *reasonable factual determinations* made by the Board on a case by case basis as opposed to *any* inflexible industrywide request for exemption. In establishing this arbitrary line, the Board has, in effect, adopted a position diametrically opposed to the position it advocated in *Bayside* and the approach this Court adopted. As observed earlier, the Board, in defense of this turnaround, has cited footnote 9 in *Bayside* in which this Court quoted the Board's position on this matter. This footnote can best be characterized as merely a recitation of the Board's position by this Court. This footnote cannot be construed as an adoption of such an inflexible rule when the entire thrust of the *Bayside* opinion centers on individual analysis of each activity of an employer to glean whether the agricultural exemption is proper for each group of workers.

In keeping with the case by case approach dictated by *Bayside,* we must analyze the activities of the petitioner. This analysis leads to the inescapable conclusion that the agricultural exemption for the workers involved is appropriate in this case. As was revealed

in an earlier portion of this petition, the individuals involved in this litigation are Hudson Farms' workers who pick up broilers from the independent growers and transport the *live* broilers to the live-haul truck lot. The important facet present here, from the perspective of attempting to apply the agricultural exemption, is the undeniable fact that when Hudson Farms picks up its broilers it is performing functions normally associated with farming. Having once again resumed full control over the care and well being of the broilers, Hudson Farms has responsibility over all functions which relate to their well-being. The husbandry of the birds is once again solely in the hands of Hudson Farms. The decision of the Board, while paying lip service to the facts surrounding the farming functions performed by Hudson Farms, totally ignores the agricultural significance of the duties of these workers in particular, and the agricultural mission of the entire Hudson Farms operation in general. This failure by the Board, as adopted by the Eighth Circuit's decision, directly runs afoul of this Court's recognition in *Bayside* that an integrated poultry producer will have some aspects of its operation which are suitable for the exemption and some which are not:

> "An employer's business may include both agricultural and non-agricultural activities . . . In this case, both parties agree that some of *Bayside's* operations are agricultural and some are not." *Bayside, supra.* at 301.

Petitioner submits the correct approach in assessing the appropriateness of applying the agricultural exemption to employees performing duties almost identical to those performed in the case at bar was developed by the Fifth Circuit in *Coleman v. Sanderson Farms,* 629 F.2d 1077 (1980). In this case the plaintiff's loader

operators and live-haul drivers brought suit to recover overtime compensation alleged to be due them from the defendant, Sanderson Farms, Inc. Sanderson Farms' operations are typical of most vertically integrated producers and the petitioner's Hudson Farms. Sanderson Farms hatched all its broilers in company owned hatcheries from eggs produced by its own breeder flocks. After vaccinating and debeaking the broiler chicks, the company delivered them to independent contract farms where they were raised to market age and size. As in this case, Sanderson Farms was responsible for all the important decisions involving the broilers. Sanderson Farms assumed all the risks, supplied the food, medicine and supplies for the care of the broilers. Sanderson Farms' personnel made routine visits to the independent contract farms to consult with and inspect the broilers while they were in the hands of the independent grower. After the broilers reached market size and weight, they were picked up by Sanderson Farms' employees. It was the live-haul drivers and coop loaders who brought the action against Sanderson Farms for overtime.

Sanderson Farms maintained that these employees were exempt as agricultural employees. The District Court and Fifth Circuit Court of Appeals agreed. The plaintiffs argued that the District Court erred in applying the logic expressed in *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir., 1969) to their case,[11] since in plaintiff's opinion *Strain* had been over-

[11] The decisions in **NLRB v. Strain Poultry Farms, Inc.**, 405 F.2d 1025 (5th Cir., 1969) and **NLRB v. Victor Ryckebosch, Inc.**, 471 F.2d 20 (9th Cir., 1972), were the primary basis for the argument that all the farming activities of the independent grower could be attributed to the vertically integrated poultry producer to afford all its employees

ruled by this Court in *Bayside*. The Fifth Circuit declined to adopt the argument of the plaintiffs, insisting that its decision in *Strain* was sound. In defense of its decision in *Strain* the Fifth Circuit first observed the strong factual distinction existing between the *Strain* and *Sanderson* cases on the one hand and *Bayside* on the other hand. *Strain* and *Sanderson* involved live-haul drivers while *Bayside* considered feed truck drivers. The significance attached to this distinction by the Fifth Circuit, involved the realization that in *Strain* and *Sanderson* the drivers are actually concerned with the care and custody of the broilers, the type of activity normally attributable to the farmer, while in *Bayside* the workers were merely hauling feed, a function which may or may not be performed by a farmer.

Most pursuasive was the Fifth Circuit's application of *Bayside* as a precedent for its position in *Sanderson*. The Court in *Sanderson* observed that *Bayside* recognized that some of the activities of an employer might be considered agricultural and some non-agricultural. In addition, the Fifth Circuit in *Sanderson* identified the following passage in *Bayside* as the turning point in all of these cases; whether an employee is exempt in the area of secondary or incidental farming activities depends upon the character of their employer's activities when the work is not performed on a farm.

> "Since there is no claim that these drivers worked 'on a farm' the question is whether their activity should be regarded as work performed 'by a farmer.' The answer depends on the character of their employer's activities." *Bayside, supra.*, at 301.

The Court, in *Sanderson*, then analyzed the activities

exempt status. As noted earlier, this Court in Bayside rejected this comprehensive approach.

of the employer as they related to the work performed by the employees in question. The Court naturally came to the conclusion that the transportation of broilers to market was in conjunction with the employer's ultimate aim — the production of an agricultural product, live broilers for market. This conclusion was further supported by the FLSA itself which specifically states that employees engaged in "preparation for market" and "delivery to storage or to market", 29 U.S.C. §203(f) are exempt since they are activities "incidental to any farming enterprise", *Id.* at 1081. This perceptive reading of *Bayside* by the Fifth Circuit is equally beneficial in this case, since the employees involved in the case at bar are performing the same functions.

Only a forced and constricted reading of *Bayside* would yield the result advanced by the Board and confirmed by the Eighth Circuit. The artificial line drawn by the Board at a point when a vertically integrated poultry producer places the broiler chicks with the independent grower is not reasonable when the realities of the modern poultry farmer are examined. This Court's ruling in *Bayside* that the farming activities of the independent grower cannot be attributed to the vertically integrated poultry producer to *expand* the scope of the exemption, did not restrict or limit the applicability of the exemption for *farming* activities performed by the vertically integrated poultry producer.[12] Rejection of an expanded interpretation of

[12] This Court in **Bayside** did not purport to limit the availability of the agricultural exemption as it applies to an employer's farming activities. The following language from **Bayside** makes this point clear:

"An employer's business may include both agricultural and non-agricultural activities." **Bayside, supra.** at 301.

the agricultural exemption does not automatically translate into a construction which would judicially repeal the exemption as it applies to existing farming activities. The line drawn by the Board in the instant case, however, seeks to accomplish this very result.

At no time has the Board given serious consideration to the simple fact that care administered to the birds by the live-haul drivers and yard personnel is no less vital to the overall goal of producing a marketable agricultural commodity than the care given by the hatchery personnel which the Board has consistently deemed exempt. *Lindstrom Hatchery*, 49 NLRB 776 (1943); *Fairmont Foods*, 81 NLRB 166 (1949); *Arkansas Valley Industries*, 167 NLRB 47 (1967). The notion that farmer status is lost once birds are temporarily placed in the hands of an independent grower apparently springs from the misconception that all farming activities of the vertically integrated poultry producer ends at this point. From whence the Board's wisdom leads it to such a conclusion concerning the husbandry of poultry is not explored in any of its decisions. The clear fact remains, however, that this rule ignores the undisputed fact that the care of the live poultry is totally within the hands of the live-haul drivers when they take possession from the independent grower. This rule equally ignores the realization that a line cannot be drawn arbitrarily at one point in the production cycle of poultry for the purpose of either irrevocably applying or not applying the agricultural exemption. Such an all or nothing scheme was rejected by this Court in *Bayside*.

It is a logical conclusion that, since the raising of poultry is specifically mentioned as being an agricultural pursuit deserving of the exemption, during every

stage of the poultry production cycle some entity involved in the raising of the broilers must be considered a farmer and may avail itself of the exemption. Query, under the Board's approach, who is the farmer with respect to the birds after the grow-out phase is completed and the poultry is ready for transport? The independent grower, having completed his function, is no longer involved and cannot be the farmer. The Board rejects the proposition that the vertically integrated producer is the farmer, even though he owns the birds and is totally at risk should they not be cared for after leaving the independent grower's facility. The only conclusion left is that the Board obviously believes that no one is a farmer at this critical juncture. In adopting this approach, the Board has repealed the agricultural exemption as it relates to delivery to market, an activity specifically covered under the Statute, 29 U.S.C. §203 (f). Only Congress, is vested with the authority to limit the exemption in this fashion. The Board's position as sustained by the Eighth Circuit is, therefore, not faithful to the NLRA and must be reversed.

To sustain this arbitrary cut-off point, the Board has also argued that its decision concerning its jurisdiction must be adhered to by the Courts. It is without question that the Board's determination concerning its jurisdiction is sustainable if reasonable and faithful to the NLRA. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978). The Board's judgment in such matters, however, is not infallible. *NLRB v. Yeshiva University*, 434 U.S. 672 (1980). Courts have in the past and must continue in the future to examine the record of administrative proceedings to determine if justification is present for the assertion of jurisdiction by an administrative agency.

The position of the Board here cannot be supported by the record. Extensive evidence was produced as to the character of the farming activities performed by Hudson Farms, including its hatchery operation (Tr. 18). The Board's arbitrary cut-off point as applied to the facts in this case is no less of an attempt to apply a conclusionary rationale developed in earlier Board decisions as was the case in *Yeshiva*. This Court has specifically condemned this type of decision. A decision resting on such an infirm foundation is clearly subject to review and does not deserve the respect normally accorded Board jurisdictional decisions. As Judge Friendly observed in an independent contractor exemption context in *Lorenz Schneider Co. v. NLRB*, 517 F.2d 445, (2nd Cir. 1975), the Congress intended the Courts to review decisions concerning asserted Board jurisdiction and not merely bow to the purported expertise of the Board:

> "The legislative history of the Taft-Hartley Act reveals a clear desire on the part of Congress to restrain the tendency of the courts . . . to bow to the supposed expertness of the Board in its assessment whether a particular group of employees should be considered employees for the purposes of Sec. 2(3) of the National Labor Relations Act, 39 Stat. 449, 450 (1935). SEE H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947), reprinted in 1 Leg. Hist. of the Labor Management Relations Act, 1947, p. 309 (1948)...." *Id.* at n. 1, 446.

The Board's self-serving use of this Court's deference to its decisions forms the only real basis for affirming the result in this case. After considering the Board's decision affirmed by the Eighth Circuit, this Court must decline the invitation of the Board and the Eighth Circuit to abandon meaningful review based on some theory of weight, deference or special expertise to be

bestowed on Board jurisdictional decisions. A meaningful review of this case, in petitioner's belief, can only lead to a finding of error in the Board's position as sustained by the Eighth Circuit.

CONCLUSION

The Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

JAMES A. GILKER
Gilker And Swan
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Fort Smith, Arkansas 72913
Telephone: (501) 783-3109
Counsel for the Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1981

No. 82-1038

National Labor Relations Board,

Petitioner,

vs.

Hudson Farms, Inc.,

Respondent.

Application for Enforcement of Order of the National Labor Relations Board

JUDGMENT

BEFORE: HEANEY, Circuit Judge, MILLER, Judge, and COLLINSON, Senior District Judge

On July 1, 1982, the Court being fully advised in the premises handed down its opinion granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF it is hereby ordered and adjudged that the said order of the National Labor Relations Board be enforced and that Hudson Farms, Inc., its officers, agents, successors, and assigns, abide by and perform the directions in said order.

Robert D. St. Vrain
Clerk, United States Court of Appeals
for the Eighth Circuit.

Costs taxed in favor of Petitioner:
Cost of reproducing brief: $84.04
Total costs of petitioner for recovery from respondent: $84.04
A True Copy:

Attest: Robert D. St. Vrain
Clerk, U.S. Court of Appeals,
Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1038

National Labor Relations Board,
Petitioner,
v.
Hudson Farms, Inc.,
Respondent.

On Application for Enforcement of an Order of the National Labor Relations Board.

Submitted: June 15, 1982
Filed: July 1, 1982

Before HEANEY, Circuit Judge, MILLER,* Judge, and COLLINSON,** Senior District Judge.

PER CURIAM.

This case is before the Court on the application of

*The HONORABLE JACK R. MILLER, Judge for the United States Court of Customs and Patent Appeals, sitting by designation.

**The HONORABLE WILLIAM R. COLLINSON, Senior District Judge for the United States District Court for the Western District of Missouri, sitting by designation.

the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, for enforcement of its order issued on September 30, 1981, against Hudson Farms, Inc., 258 NLRB No. 49 (1981). The Board found that Hudson Farms violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the General Drivers and Helpers Union, Local 823, which had been certified as the bargaining representative for the company's truck drivers and yard workers. It ordered Hudson Farms to cease and desist from refusing to bargain with the Union, or otherwise violating the employees' Section 7 rights, and directed the company to bargain with the Union upon request.

Hudson Farms, an integrated poultry producer, employs truck drivers and yard workers to transport its poultry between independent contract growers, which raise the chickens to market weight, and the company's processing plant. Hudson Farms contends that these employees are "agricultural laborers" who are exempt from the Act's coverage under the meaning of Section 2(3). Accordingly, the company argues that the Board's Bargaining order should be denied enforcement because the Union includes these truck drivers and yard workers who are exempt from the Act's coverage.

The sole question presented here is whether Hudson Farms' truck drivers and yard workers are "employees" or "agricultural laborer[s]" within the meaning of Section 2(3) of the Act. This issue is controlled by *Valmac Industries v. NLRB,* 599 F.2d 246, 248-249 (8th Cir. 1979). In *Valmac Industries v. NLRB, supra,* 599 F.2d at 249, this Court, relying on *Bayside Enterprises, Inc. v. NLRB,* 429 U.S. 298 (1977), held that

employees who transported live poultry from an independent grower's farm to their employers' processing plant were "employees" not "agricultural laborer[s]" under the Act.

Accordingly, on the basis of *Bayside Enterprises, Inc. v. NLRB, supra,* and *Valmac Industries, Inc. v. NLRB, supra,* and the evidence as a whole, we hold that the Board's determination that Hudson Farms' truck drivers and yard workers are "employees," rather than "agricultural laborer[s]," under Section 2(3) of the Act is warranted by the record and has a reasonable basis in law. The Board, therefore, properly determined that Hudson Farms violated Section 8(a)(5) and (1) of the Act, and its order is enforced.

A true copy.

Attest: Robert D. St. Vrain

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

258 NLRB No. 49

FJZ
D — 8121
Noel, MO

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

HUDSON FARMS, INC.

and

Case 17 — CA — 10298

GENERAL DRIVERS AND HELPERS
LOCAL NO. 823, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA

DECISION AND ORDER

Upon a charge filed on April 14, 1981, by General Drivers and Helpers Local No. 823, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, and duly served on Hudson Farms, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, issued a complaint on April 29, 1981, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on February 23, 1981, following a Board election in Case 17 — RC — 9173, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate:[1] and that, commencing on or about April 3, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On May 11, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 29, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 3, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause. The Union filed a statement in support of the Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Nation-

[1] Official notice is taken of the record in the representation proceeding, Case 17 — RC — 9173, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and regulations, Series 8, as amended. See **LTV Electrosystems, Inc.**, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir., 1968); **Golden Age Beverage Co.**, 167 NLRB 151 (1967), enfd., 415 F.2d 26 (5th Cir. 1969); **Intertype Co. v. Penello**, 269 F.Supp. 573 (D.C. Va. 1967); **Follett Corp.**, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

al Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and in response to the Notice To Show Cause, Respondent admits that it had refused the Union's request to recognize and to bargain with it as the exclusive bargaining representative of a unit of Respondent's truck drivers and yard employees. In defense, Respondent contests the certification. Specifically, Respondent argues that the unit employees are agricultural laborers within the meaning of Section 2(3) of the Act, and are therefore exempt from coverage under the Act. The General Counsel asserts that Respondent improperly seeks to relitigate issues which were raised and decided in the representation case. We agree with the General Counsel. A review of the record, including the record in Case 17 — RC — 9173, reveals that Respondent's position was litigated and decided in the representation proceeding. In that proceeding Respondent was given full opportunity to present evidence that the employees sought to be represented were not "employees" within the meaning of Section 2(3) of the Act. The evidence and the legal position of Respondent were considered and evaluated by the Regional Director in his Decision and Direction of Election. The Regional Director concluded that the drivers and yard employees in dispute were not agricultural laborers within the meaning of the Act. Respondent timely filed a request for review of this decision by the Board. On February 10, 1981, the Board telegraphically denied Respondent's Request.

On February 12, 1981, the Union won the election conducted by the Regional Director pursuant to his Decision and Direction of Election. On February 23, 1981, the Regional Director certified the Union as the exclusive bargaining representative of the unit employees.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. The Business of Respondent

Respondent, an Arkansas corporation, is engaged in the production and marketing of live poultry at various facilities including a facility located at Noel, Missouri.

[2] See **Pittsburgh Plate Glass Co. v. N.L.R.B.**, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

In the course and conduct of its business operations within the State of Missouri, Respondent annually purchases goods and services valued in excess of $50,000, directly from sources located outside the State of Missouri. Respondent also annually sells goods and services valued in excess of $50,000 directly to customers located outside the State of Missouri.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in Commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

General Drivers and Helpers Local No. 823, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The Unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time truck drivers and yard employees employed by the Employer and headquartered in Noel, Missouri, excluding chicken catchers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On February 12, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 17, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on February 23, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about April 3, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 9, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since April 9, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practice Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 *NLRB* 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 *NLRB* 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Hudson Farms, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. General Drivers and Helpers Local No. 823, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time truckdrivers and yard employees employed by the Employer and headquartered in Noel, Missouri, excluding chicken catchers, office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 23, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 9, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section

7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Hudson Farms, Inc., Noel, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with General Drivers and Helpers Local No. 823, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time truckdrivers and yard employees employed by the Employer and headquartered in Noel, Missouri, excluding chicken catchers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Noel, Missouri, facility copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. September 30, 1981

John H. Fanning,	Member
Howard Jenkins, Jr.	Member
Don A. Zimmerman,	Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with General Drivers and Helpers Local No. 823, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time truckdrivers and yard employees employed by the Employer and headquartered in Noel, Missouri, excluding chicken catchers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

HUDSON FARMS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Two Gateway Center, Room 616, Fourth at State, Kansas City, Kansas 66101, Telephone 816-374-4688.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELAIONS BOARD
Noel, Missouri

HUDSON FARMS, INC.[1]
Employer

and

GENERAL DRIVERS AND HELPERS,
LOCAL 823,
affiliated with the INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA
Petitioner

Case No. 17-RC-9173

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

[1] The Employer's name appears as corrected at the hearing.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:[2]

---

[2] The Employer is an Arkansas corporation engaged in the production and marketing of live poultry in Missouri, Arkansas and Oklahoma. The Petitioner seeks to represent a unit of truck driving and yard employees. Both the Employer and the Petitioner agree to the appropriateness of such a unit and the record fully supports a finding that these employees have a community of interest regarding their wages, hours and terms and conditions of employment. The parties disagree only as to whether these individuals are employed in agriculture within the meaning of Section 2(3) of the Act. That section provides that the term "employee" shall not include any individual employed as an agricultural laborer. There is currently no collec-

ive bargaining agreement in effect covering these employees.

The Employer buys poultry breeding stock and places it with contract pullet producers and contract breeder producers. Hatching eggs from these producers go to the company-owned hatcheries and are then delivered as day-old hatchery chicks to contract farmers. These contract farmers are provided with feed, medication and broiler service personnel by the Employer. At approximately seven to eight weeks of age, the chicks are transported to a processing plant in Noel, Missouri. The Employer owns the chicks throughout this entire operation.

The individuals in question drive the trucks from the contract farmers' facilities to the processing plant's live-haul lot. Yard employees then weigh the full trailer, deliver it to the processing plant and weigh the empty trailer. There are approximately fifteen truck drivers and two yard employees.

The following quote from **Victor Ryckebosch, Inc.**, 139 NLRB 40 at 44-45 summarizes general Board law applicable herein:

> The congressional standard for determining whether employees are agricultural laborers is set forth in Section 3(f) of the Fair Labor Standards Act (29 U.S.C. Sec. 203(f)). Since 1946, the appropriations acts for the Board have regularly carried a rider which provides that the term "agricultural laborer" shall be defined in accordance with Section 3(f) of the Fair Labor Standards Act. This provision reads in pertinent part as follows:
>
> "Agriculture" includes farming in all its branches and includes . . . the raising of poultry, and practices . . . performed by a farmer or on a farm as an incident to, or in conjunction with, such farming operations . . ."

The Supreme Court stated with respect to this provision in **Farmers Reservoir & Irrigation Co. v. McComb**, 337 U.S. 755, 762-763, "this definition has two distinct branches." The primary meaning, which is admittedly inapposite here, involves actual farming operations such

as the raising of produce from the soil or the raising of poultry. The secondary definition in the Court's words, "includes any practices, which are performed either by a farmer or on a farm, as an incident to or in conjunction with 'such' farming operations, including preparation for market, delivery . . . to market or to carriers for transportation to market." (Ibid.)

Query: Are the conditions of the secondary meaning satisfied with respect to the coop truckdrivers in this case?

The Supreme Court in the **Farmers Reservoir** case, **supra,** specifically pointed out that under the second branch of the statutory definition of agriculture, it is not only necessary that the practices in question be performed "by a farmer or on a farm," but they must also be incidental to "such" farming as is performed under the first branch of the definition. 337 U.S. at 766-767. The Supreme Court's footnote 15 at pages 766-767 expressed its view concerning the second branch of the definition as follows:

> . . . there is the additional requirement that the practices be incidental to "such" farming. Thus, processing on a farm of commodities produced by other farmers is incidental to or in conjunction with the farming operation of the other farmers and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done. Such processing is, therefore, not within the definition of agriculture. **Bowie v. Gonzalez,** 117 F.2d 11 (C.A. 1, 1941).

Because the individuals herein are clearly not engaged in farming within the Supreme Court's primary meaning, it is necessary to determine whether they are engaged in practices performed by a farmer or on a farm as an incident to or in conjunction with farming operations. If the individuals in question are performing work on agricultural products produced on farms other than their own employer's, then their claimed agricultural status must be rejected. **Victor Ryckebosch, Inc., supra** at 45 and cases cited therein in footnote 10. Further, the Board held in that case, under identical facts, that the contract farmer was the "farmer" raising poultry on land in his possession and control and that

All full-time and regular part-time truck drivers and yard employees employed by the Employer and headquartered in Noel, Missouri EXCLUDING chicken catchers, office clerical employees, professional employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION[3]

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject

---

the employer therein, who owned the poultry from cradle to grave, was predominately an investor, a marketer and a shipper of poultry.

I am unable to distinguish that case from the facts herein and accordingly I find that the Employer is not a "farmer" and that the activities of the truck drivers and yard employees in hauling the poultry from the contract growers farms do not cause them to be agricultural laborers within either the primary or secondary definition of agriculture as defined by Section 3(f) of the Fair Labor Standards Act. See also **Valmac Industries, Inc.**, 237 NLRB 992, 994; **Austin J. DeCoster d/b/a DeCoster Egg Farms**, 223 NLRB 884, 886; **Colchester Egg Farms, Inc.**, 214 NLRB 612, 613; **McElrath Poultry Company, Inc.**, 206 NLRB 354, 355; **Jack Frost, Inc.**, 201 NLRB 659, 660. Inasmuch as the truck drivers and yard employees are not employees of the contract growers who are farmers but are employed by the Employer delivering the results of someone else's farming efforts, their functions do not constitute practices which are performed either by a farmer or on a farm incidental to or in conjunction with such farming operations. Accordingly, I find that they are employees within the meaning of the Act.

[3] Since I have concluded that the individuals sought by the petition are employees, within the meaning of the Act, the Employer's Motion to dismiss the petition because it covers agricultural laborers is hereby denied.

to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately before the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by GENERAL DRIVERS AND HELPERS, LOCAL 823, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 *NLRB* 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394

U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned Officer-in-Charge, Subregion, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 616 Two Gateway Center, Fourth at State, Kansas City, Kansas 66101 on or before January 20, 1981.

No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by January 26, 1981.

Dated January 13, 1981
at Kansas City, Kansas

/s/ Thomas C. Hendrix
Regional Director, Region 17

APPENDIX C

NATIONAL LABOR RELATIONS ACT, 29 U.S.C. §152(3)

§152 Definitions:

When used in this subchapter —

(3) The term "employee" shall include any employee and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. . . .

FAIR LABOR STANDARDS ACT, 29 U.S.C. §203(f)

§203 Definitions:

As used in this chapter —

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including com-

modities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations, performed by a farmer or on a farm as an incident to or in conjunction with such farming operations) including preparation for market, delivery to storage or to market or to carriers for transpotation to market. . . .

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No. 82-368

In the Supreme Court of the United States

OCTOBER TERM, 1982

HUDSON FARMS, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's live-haul truck drivers and yard personnel are "agricultural laborers" within the meaning of Section 2(3) of the National Labor Relations Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-4a) is reported at 681 F.2d 1105. The decision and order of the National Labor Relations Board (Pet. App. 5a-16a) are reported at 258 N.L.R.B. 391. The Regional Director's decision and direction of election (Pet. App. 16a-24a) in the underlying representation proceeding are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on July 1, 1982. The petition for a writ of certiorari was filed on September 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), and Section 3(f) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 203(f), are set out at Pet. App. 23a-24a.

STATEMENT

1. Petitioner purchases poultry breeding stock and places it with a number of contract producers. Some of the eggs produced by the hens left with the contract producers are transported to petitioner's hatcheries. When the eggs hatch, the chicks are immediately delivered to contract grow-out farms. Petitioner provides the contract grow-out farmers with feed, medication, and its own broiler service personnel. The contract grow-out farmers feed and care for the chicks until they are market-weight—approximately seven to eight weeks. Petitioner retains title to the chicks throughout the grow-out operation. (Pet. App. 3a, 18a n.2.)

Petitioner's live-haul drivers and yard personnel are involved in the two-stage transfer of the market-weight chicks from the contract grow-out farms to the processing plant (owned by petitioner's parent company) where the chicks are slaughtered. The drivers transport the chicks by trailer-truck from the grow-out farms to the live-haul lot adjacent to the processing plant; the yard personnel weigh the full trailers, deliver the chicks to the plant, and weigh the empty trailers. (Pet. App. 18a n.2.)

2. In December 1980, a Teamsters Union local filed a representation petition with the NLRB seeking certification as the collective-bargaining agent of petitioner's live-haul truck drivers and yard personnel. Petitioner asserted that the employees were agricultural laborers and therefore

outside the scope of Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3). (Pet. App. 16a-22a.)[1]

Following the Board's decision in *Victor Ryckebosch, Inc.*, 189 N.L.R.B. 40 (1971), enforcement denied, 471 F.2d 20 (9th Cir. 1972), the Regional Director concluded (Pet App. 19a-20a) that petitioner's live-haul drivers and yard personnel are not agricultural laborers. In *Ryckebosch* the Board evaluated the status of live-haul drivers who transported chicks from contract grow-out farms to a processing plant (189 N.L.R.B. at 44-48), using the analysis set out in *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755 (1949), which distinguishes between "primary" and "secondary" agricultural activity for purposes of Section 3(f) of the FLSA (and hence Section 2(3) of the National Labor Relations Act).[2] Since the live-haul drivers in *Ryckebosch* were not "raising poultry" but transporting marketweight chicks from farms to a processing plant, the Board

---

[1]As defined in Section 2(3) of the National Labor Relations Act, the term "employee" does not include "any individual employed as an agricultural laborer." Since 1946, Congress has linked the phrase "agricultural laborers" to the definition of "agriculture" in Section 3(f) of the FLSA, 29 U.S.C. 203 (f), which in pertinent part is as follows:

> "Agriculture" includes farming in all its branches and among other things includes * * * the raising * * * of poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

[2]"Primary" agriculture embraces only actual farming operations such as soil tillage, dairying, or the raising of poultry. "Secondary" agriculture is the work performed "by a farmer" or "on a farm," "incident to or in conjunction with" "primary" farming activity; secondary agriculture includes delivering the agricultural product to market. Employees who handle, work with, or otherwise perform tasks incidental to the agricultural product of farmers other than their own employer are not engaged in "secondary" farming activity. *McComb, supra*, 337 U.S. at 762-763, 766-767 & n.15.

concluded they were not engaged in "primary" agricultural activity (189 N.L.R.B. at 44 & n.9). Nor were the live-haul drivers engaged in "secondary" agriculture, because their employer was not a "farmer" with respect to the poultry they handled. The Board explained (*id.* at 46):

> [e]ven though [the employer] has invested in and owns a substantial equity in the poultry raising operation, it is nevertheless not the "farmer" who is raising the poultry on the farm. The contract grower is the "farmer" raising the poultry on land in his possession and control. The [employer] is predominantly an investor, a marketer, and a shipper of poultry to processing plants.

Here, the Regional Director found (Pet. App. 19a-20a) "identical facts," and therefore rejected petitioner's claim that the live-haul drivers and yard personnel at issue are agricultural laborers. The Board sustained the Regional Director's decision (Pet. App. 7a).

The union won the representation election and was certified by the Regional Director as the bargaining agent of the employees (*id.* at 8a). Petitioner contested the validity of the certification, and refused to bargain with the union, which therefore filed unfair labor practice charges with the Board (*id.* at 5a-7a). The Board found that petitioner's refusal to bargain violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. 158 (a)(1) and (5), and issued a bargaining order (Pet. App. at 10a-11a, 13a-14a).

3. The court of appeals enforced (Pet. App. 2a-4a) the Board's order on the authority of *Valmac Industries, Inc.* v. NLRB, 599 F.2d 246, 249 (8th Cir. 1979). In *Valmac Industries,* the court of appeals sustained the Board's conclusion that "employees who transported live poultry from an independent grower's farm to their employers' processing plant were 'employees' not 'agricultural laborer[s]' under the Act" (Pet. App. 3a-4a).

ARGUMENT

The decision below—sustaining the Board's finding that petitioner's live-haul drivers and yard personnel are not agricultural laborers—is fully consistent with this Court's decision in *Bayside Enterprises Inc.* v. *NLRB*, 429 U.S. 298 (1977).

Contrary to petitioner's contention (Pet. App. 13-19), *Bayside* unambiguously approves the Board's position that an "employer's status as a farmer engaged in the raising of poultry ends with respect to [the] chicks" when the "employer contracts with independent growers for the care and feeding of the employer's chicks." *Bayside, supra*, 429 U.S. at 302 & n.9 (citation omitted)).[3] Accordingly, the chicks hauled to the processing plant were not petitioner's farm products but those of the contract growers. Hence, petitioner's drivers and yard personnel were not engaged in secondary agriculture (see note 2, *supra*). [4]

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[3]In upholding the Board's determination that drivers who transported feed from their employer's feed mill to contract poultry farms were not agricultural laborers, the Court rejected the poultry producer's contention that it was a "farmer" with respect to poultry it entrusted to the farms of contract growers, even though the producer supplied the farms with feed, medicine, fuel, litter, and vaccine, and retained title to the chicks(429 U.S. at 301-302).

[4]The Board's position does not "repeal[] the agricultural exemption as it relates to delivery to market" (Pet. 19). Had petitioner raised the chicks itself, instead of contracting that operation to independent growers, it would have remained a "farmer" with respect to those chicks, and petitioner's drivers who transported them to market would have been agricultural laborers.

In any event, the position urged by petitioner (Pet. 10, 12-13)—that, contrary to the teaching of *Ryckebosch* and *Bayside*, an employer resumes its status as a "farmer" with resumption of custody over poultry—would not avail petitioner here. For, the record unambiguously shows that petitioner resumes custody of the contract grow-out chicks not for the purpose of *raising* them (a "primary" agricultural activity), but solely to deliver them to the processing plant where they

There is no merit to petitioner's contention (Pet. 7-9) that the decision below conflicts with *Coleman* v. *Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. 1980). *Sanderson Farms* holds that employees who transport poultry from contract farmers to their employer's processing plant are agricultural laborers within the meaning of Section 3(f) of the FLSA. Nonetheless, *Sanderson* was an action to recover overtime wages under the FLSA. The case went to the Fifth Circuit on appeal from a district court decision granting the employer's motion for summary judgment and not on review of a Board order. The Fifth Circuit explicitly recognized (629 F.2d at 1081 n.4) the significance of this "different procedural posture." Thus, the court suggested that *Bayside* had only approved the Board's contrary position as a *permissible* reading of the statute. Absent "the policy of judicial deference to the administrative determinations of the National Labor Relations Board," that reading of the statute was not controlling. Accordingly, even in the Fifth Circuit *Sanderson Farms* would not be controlling in this case. Here, there is a Board determination that the employees in question are not agricultural laborers, and, as the Fifth Circuit recognized in *Sanderson*, such a determination is entitled to considerable deference "regardless of how [the court] might have resolved the question as an initial matter" (629 F.2d at 1081 n.4, quoting *Bayside, supra*, 429 U.S. at 304).

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are *slaughtered*—an activity that is not "primary" agriculture. *Bayside, supra*, 429 U.S. at 301; Department of Labor regulations, 29 C.F.R. 780.135. Accordingly, the live-haul drivers and yard personnel who assist petitioner in this aspect of its operations would not be engaged in "secondary" agriculture, even under petitioner's theory.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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